

1-1-1999

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Recommended Citation

David L. Jordan, *Separation of Powers: The Appointment of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights*, 26 HASTINGS CONST. L.Q. 935 (1999).

Available at: https://repository.uchastings.edu/hastings_constitutional_law_quarterly/vol26/iss4/3

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Separation of Powers: The Appointment of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights

By DAVID L. JORDAN*

I. Introduction

In June, 1997, President Clinton announced he would nominate Bill Lann Lee for Assistant Attorney General for Civil Rights.¹ The nomination required the advice and consent of the Senate to become official.² By early November, 1997, it became clear that the Republican-controlled Senate Judiciary Committee would vote down the Lee appointment, forcing committee Democrats to block the vote.³ On November 13, Senator Orrin Hatch (R-UT), Chair of the Senate Judiciary Committee, called Lee's "nomination 'dead,' because Lee supports affirmative action and opposes California's Proposition 209."⁴ To avoid the Senate's rebuke, President Clinton named Bill Lann Lee "Acting" Assistant Attorney General for Civil Rights on December 15, 1997.⁵

This Note analyzes the separation of powers problem inherent in such an appointment by looking to the Appointments Clause in the Constitution⁶ and the alleged statutory authority supporting such an appointment.⁷ Part II of the Note gives a brief chronology of events leading to Lee's appointment on an acting basis and describes the alleged statutory authority for it. Part III looks at the Appointments Clause in the Constitution,⁸ followed by a discussion of the Framers'

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1. See *Clinton Names Fischer, Lee to Justice Positions*, WALL ST. J., June 13, 1997, at B8.

2. See 28 U.S.C. § 506 (1997). See also U.S. CONST. art. II, § 2, cl. 2.

3. See Eva M. Rodriguez and Edward Felsenthal, *Vote on Nominee for Civil-Rights Post Delayed as Clinton's Choice Is in Peril*, WALL ST. J., Nov. 7, 1997, at A20.

4. Angie Cannon, *Facing Defeat Nominee Sees Gain, Clinton's Pick for Civil Rights Post Recalls Humble Start*, SAN JOSE MERCURY NEWS, Nov. 13, 1997, at A23.

5. See John F. Harris and Helen Dewar, *President Bypasses Congress, Appoints Lee on 'Acting' Basis*, WASH. POST, Dec. 16, 1997, at A1.

6. See U.S. CONST. art. II, § 2, cl. 2.

7. See 5 U.S.C. §§ 3345-49 (1994). See also 28 U.S.C. §§ 509-10, 543 (1994).

8. See U.S. CONST. art. II, § 2, cl. 2.

intent. Part IV develops the separation of powers doctrine and applies it to the facts underlying the Lee appointment. In applying constitutional requirements, and statutory authority for an "acting" appointment, to the separation of powers doctrine developed by the Court in *Youngstown Sheet & Tube Co. v. Sawyer*⁹ and subsequent expressions,¹⁰ it becomes clear that the appointment of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights was an unconstitutional act in violation of the separation of powers.

II. The Chronology of Events and Statutory Authority

A. The Politics Behind the Appointment

Bill Lann Lee, before his nomination and acting appointment to the civil rights post, was the western regional counsel of the National Association for the Advancement of Colored People's (NAACP) Legal Defense and Educational Fund, Inc. (LDEF).¹¹ Lee had spent his entire career with the NAACP's LDEF before leaving to join the Justice Department.¹² The nomination of Lee was a ground breaking event, because he would be the first Asian-American to lead the civil rights division if his nomination was confirmed.¹³

However, it soon became apparent that Senate Republicans on the Judiciary Committee, who must first pass on the nomination before sending it to the Senate floor for a vote, appeared more interested in making the Lee nomination a "referendum on racial preferences" than acting as the traditional rubber stamp.¹⁴ The Senate Judiciary Committee openly and critically attacked Lee's support for overturning California's Proposition 209, which ended racial preferences in that state.¹⁵ Members of the Committee were also concerned with a lawsuit Lee filed against the University of California and the Department of Education while Lee was heading LDEF's western office. The suit had alleged that the use of standardized tests was not a necessary criteria and only served to discriminate against applicants

9. 343 U.S. 579 (1952).

10. See, e.g., *Public Citizens v. United States*, 491 U.S. 440, 482 (1989) (Kennedy, J., concurring). See also, Micheal L. Yoder, *Separation of Powers: No Longer Simply Hanging in the Balance*, 79 GEO. L. J. 173, 1191 (1990) (arguing for what Yoder calls the hybrid approach to separation of powers demonstrated by Justice Kennedy's concurrence in *Public Citizens*).

11. See Robert Suro, *Police Reformer, Civil Rights Lawyer Named to Top Posts: Justice Dept. Jobs Slated for L.A. Commission President, NAACP Legal Defense Fund Litigator*, WASH. POST, June 13, 1997, at A27.

12. See *id.*

13. See *id.*

14. See Clint Bolick, *A Vote for Lee is a Vote for Preferences*, WALL ST. J., Oct. 27, 1997, at A23.

15. See *id.*

on the basis of impermissible characteristics.¹⁶ Senator Hatch stated that the Republicans on the Judiciary Committee did not oppose Lee's appointment because he was an Asian-American, but simply because his record reflects "a distorted view of the Constitution and the nation's civil-rights laws."¹⁷

Lee's nomination thus became an ideological battle ground that has led some scholars to posit that the history of presidential appointments – choosing whomever the President wishes and receiving the Senate's rubber stamp – has come to a significant end,¹⁸ especially in light of the fact that the chair of the Judiciary Committee considered Lee to be highly credentialed.¹⁹ The Senate's digression from its traditional role in the appointments process prompted President Clinton to threaten a recess appointment, whereby the President could appoint Lee on an interim basis while Congress was in recess.²⁰ Lee could then hold the position through the next session of Congress.²¹ Experts on the history of appointments claimed that such a move would be unprecedented, because no recess appointment has ever followed a rebuff by the Senate.²²

Senate Republicans quickly responded, asking the President not to bypass the Senate.²³ In an effort to compromise, Senate Republicans and the President agreed that making Lee an "acting" appointment would be less confrontational and less repugnant to the Senate's role in the appointment process.²⁴ Thus, on December 15, 1997, President Clinton named Bill Lann Lee Acting Assistant Attorney General for Civil Rights.²⁵

B. Statutory Authority for the Acting Appointment

The sole statutory authority for appointing an official to a post requiring the advice and consent of Congress, such as Assistant Attorney General for Civil Rights,²⁶ is the Vacancies Act.²⁷ The Vacancies

16. See *id.*

17. Rodriguez and Felsenthal, *supra* note 3, at 1.

18. See Angie Cannon and Robert A. Rankin, *Senate Panel's Vote Leaves Civil Rights Nominee in Limbo Long-Term Question Is: Can a President Function if He Can't Choose Staff?*, SAN JOSE MERCURY NEWS, Nov. 14, 1997, at A6.

19. See *id.*

20. See U.S. CONST. art. II, § 2, cl. 3.

21. See *id.*

22. See Peter Baker, *Clinton to Put Lee in Civil Rights Post: President Prepared to Bypass Senate, Use Recess Appointment*, WASH. POST, Dec. 13, 1997, at A1.

23. See *Clinton to Bypass Senate on Rights Job: GOP Leader Warns President on Move*, SAN JOSE MERCURY NEWS, Dec. 15, 1997, at A4.

24. See Brian McGrory, *Clinton May Change Lee Strategy: Might Accept 'Acting' Designation*, SAN JOSE MERCURY NEWS, Dec. 13, 1997, at A9.

25. See Harris and Dewar, *supra* note 5, at A4.

26. See 28 U.S.C. § 506 (1994).

Act, as enacted in 1868 and amended in 1994, is an attempt by Congress "to prevent presidents from undermining the Senate's confirmation prerogative,"²⁸ subject only to a recess appointment.²⁹ For offices requiring advice and consent, the only alternative to the Vacancies Act and the recess appointment is to "submit a nomination [to] Congress and await the confirmation process."³⁰ As Senators Orrin Hatch and Robert Byrd stated, "unlimited acting appointments could undermine the Senate's constitutional duty and responsibility to advise and consent on nominations."³¹

The Vacancies Act provides in relevant part:

When an officer of a bureau of an Executive Department or military appointment whose appointment is not vested in the head of the department, dies, resigns, or is sick or absent, his first assistant, unless otherwise directed by the President under section 3347 of this title, shall perform the duties of the office until a successor is appointed or the absence stops.³²

Section 3347 provides:

Instead of a detail under section 3345 or 3346 of this title, the President may direct the *head of another Executive department or military department*, whose appointment is vested in the President, *by and with the advice and consent of the Senate*, to perform the duties of the office until a successor is appointed or the absence . . . stops.³³

It is clear from the face of the statute that it does not apply to the appointment of Bill Lann Lee for two reasons: (1) under section 3346, Lee was not a "first assistant"³⁴ to the assistant attorney general for civil rights when appointed to assume the position, and (2) under section 3347, Lee was not "the head of another Executive agency or military department."³⁵ Moreover, the Vacancies Act could not apply even if Lee did meet those requirements, because appointments under sections 3346 and 3347 are limited in duration to 120-days.³⁶ That 120-day period "had been exhausted by the 181-day tenure of then-

27. See *Clinton Justice Appointment Was Violation, Agency Says*, N.Y. TIMES, Jan. 18, 1998, at A23. See also 5 U.S.C. §§ 3345-49 (1994).

28. See *Clinton Justice Appointment Was Violation, Agency Says*, *supra* note 27.

29. See U.S. CONST. art. II, § 2, cl.3.

30. *Clinton Justice Appointment Was Violation, Agency Says*, *supra* note 27.

31. Helen Dewar, *Two Senators Feel Lee Post Carries Limit of 120 Days*, BUFF. NEWS, Dec. 21, 1997, at A9. Senator Byrd is a Democrat from West Virginia.

32. 5 U.S.C. § 3346.

33. 5 U.S.C. § 3347 (1994) (emphasis added). This section specifically excludes from its coverage the office of the Attorney General, whose vacancy is covered by 28 U.S.C. section 508. However, section 508 does not cover inferior officers in the Justice Department. Thus, the assistant attorney general post would be covered by this section. *Id.*

34. 5 U.S.C. § 3346.

35. 5 U.S.C. § 3347.

36. See 5 U.S.C. § 3348 (1994).

Acting Assistant Attorney General Isabelle Pinzler before Mr. Clinton announced Mr. Lee's appointment."³⁷

Moreover, in *Williams v. Phillips*,³⁸ the court held that "a Presidential power to appoint officers temporarily in the face of statutes requiring their appointment to be confirmed by the Senate . . . would avoid the nomination and confirmation process of officers in its entirety. Constitutional provisions cannot be given such an interpretation."³⁹ Accordingly, because an acting appointment of Lee would violate the Vacancies Act, it would also violate the Constitution and be in sharp incongruence with the doctrine of separation of powers.⁴⁰

Even if Lee did qualify for an acting post, his powers would be severely limited. In *United States v. Harmon Northrop Swanson*,⁴¹ the court held that the Acting Assistant Attorney General could not authorize a wiretap, because the wiretapping statute makes clear that the authority to authorize a wiretap is limited to named officials in the statute, and "[u]ntil an Assistant Attorney General designate has been confirmed by the Senate, he does not qualify."⁴² Assuming Lee could be named on an acting basis, his powers would thus be circumscribed.

Accordingly, the Justice Department in early January, 1998, began to argue that "the Vacancies Act did not apply [to Lee's appointment] because the Attorney General had authority to fill such positions for unspecified periods."⁴³ What statutory authority the Attorney General has to fill the position can only be speculated at, since the Justice Department has been coy in giving relevant details. Presumably the argument would be that the Attorney General appointed Lee to a position like "special attorney,"⁴⁴ which does not require the advice and consent of Congress, and then delegated the powers of the Assistant Attorney General for Civil Rights upon him under 28 U.S.C. section 510.⁴⁵

37. *Clinton Justice Appointment Was Violation, Agency Says*, *supra* note 27.

38. 360 F. Supp. 1363 (D.C. Dist. 1973).

39. *Id.* at 1369.

40. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) ("The President's power . . . must stem either from an act of Congress or from the Constitution itself"). Here, President Clinton had neither statutory nor constitutional authority to appoint Lee on an acting basis. Defendants in *Youngstown* argued that the President has inherent powers that reside in the President's authority to see that the laws are faithfully executed or because the power of the Executive is his alone, but those arguments were rejected by the Court. See *id.* at 587-88; see also U.S. CONST. art. II, §§1, 3, cl. 1.

41. 399 F. Supp. 441 (D.C. Dist. 1975).

42. *Id.* at 443.

43. *Clinton Justice Appointment Was Violation, Agency Says*, *supra* note 27.

44. See 28 U.S.C. § 543 (1994).

45. "The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." 28 U.S.C. § 510 (1994). The Attorney General possesses "[a]ll functions of other officers of the Depart-

A court would likely strike down this action. The Vacancies Act was passed and amended to prevent such fast and loose play with the advice and consent clause. It specifically provides the sole avenue for the temporary filling of vacancies requiring the "advice and consent" of the Senate.⁴⁶ An appointment in contravention of the Vacancies Act, and without explicit support therefor in the Constitution, would be an unconstitutional violation of the doctrine of separation of powers.⁴⁷

III. Appointments Clause: What it Requires and the Framers' Intent

The Constitution provides that the President shall be vested with the power to "nominate, and by and with the advice and consent of the Senate, shall appoint all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law," unless the Senate specifically delegates the power of appointment to the President alone or some other department head.⁴⁸ The President enjoys constitutional authority to "fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."⁴⁹ Alexander Hamilton noted, when considering this language in his *Federalist Paper* number 76, that:

It has been observed . . . 'that the true test of a good government is its aptitude and tendency to produce a good administration.' If the justness of this observation be admitted[,] the mode of appointing the officers of the United States contained in the foregoing clauses must, when examined, be allowed to be entitled to particular commendation.⁵⁰

Hamilton believed that the Appointments Clause, as written in the new Constitution, then under consideration and subsequently adopted, would lead to a "judicious choice . . . in filling offices of the Union."⁵¹ Moreover, he felt it went without argument that the above point "essentially depend[ed] [on] the character of its administration."⁵² In essence, the argument was that this format for appointing federal officials, if strictly followed, would lead to the creation of an

ment of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General. . . ." 28 U.S.C. § 509 (1994).

46. See discussion *infra* at 109-10.

47. See *Williams v. Phillips*, 360 F. Supp. 1363, 1369 (D.C. Dist. 1973).

48. U.S. CONST. art. II, § 2, cl. 2.

49. *Id.* at cl. 3.

50. THE FEDERALIST NO. 76, at 455 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

51. *Id.*

52. *Id.*

effective and prudent administration to lead the Union.⁵³

The Framers of the Constitution also believed that this format – Presidential nomination subject to the advice and consent of the Senate – would properly satisfy their underlying desire for separation of powers. Early opponents of the Constitution, on the other hand, sought instead to have the sole appointment power reside in the President alone.⁵⁴ The Framers, however, explicitly rejected this argument, noting that splitting the power of appointment would avoid a monopoly of power accruing in the Executive, such as that possessed by the British Monarch.⁵⁵ The Framers' objective was narrowly circumscribed to avoid the aggrandizement of the appointments power and thus retain the balance of power between the Executive and Congress.⁵⁶

The Framers' intent becomes manifest when one examines their explicit rationale. "It will be the office of the President to *nominate*, and, with the advice and consent of the Senate, to *appoint* [The Senate] may defeat one choice of the Executive . . . but they cannot themselves *choose* - they can only ratify or reject. . . ."⁵⁷ The Senate may overrule the Executive choice, but only to make a "place for another nomination."⁵⁸ The person eventually appointed will be of the President's preference, even if not the first in degree.⁵⁹ The process thus results in an appointment agreeable to both the Executive and the Senate, with neither gaining a distinct advantage over the other in relation to policy development and ideology.

The Framers also answered critics who believed either (1) the President would have too much influence over the Senate under the proposed regime, or (2) that the Senate would possess too much influence over the President. With regard to the former, Hamilton observed that should the entire appointment power reside in the Executive, it would "enable him much more effectually to establish a dangerous empire over [the Senate], than a mere power of nomination subject to their control."⁶⁰ With regard to the latter he said: neither

53. *See id.*

54. *Id.*

55. THE FEDERALIST No. 69, at 420-21 (Alexander Hamilton) (Clinton Rossiter, ed. 1961). No. 69 provides an intriguing comparison between the structure and function of the British and New York systems of Executive appointments and that of the Constitution, at least as they perceived it functioning if enacted.

56. *See* Samuel W. Cooper, *Considering 'Power' in Separation of Powers*, 46 STAN. L. REV. 361, 362-63 (1994).

57. THE FEDERALIST No. 66, at 405 (Alexander Hamilton) (Clinton Rossiter, ed., 1961).

58. THE FEDERALIST No. 76, *supra* note 50, at 457.

59. *Id.*

60. THE FEDERALIST No. 77, at 460 (Alexander Hamilton) (Clinton Rossiter, ed., 1961).

would the Senate's influence over the President be so dangerous, for "[i]f by influencing the President be meant *restraining* him, this is precisely what must have been intended."⁶¹ Hamilton believed "[t]he right of nomination would produce all the good, without the ill,"⁶² because it would lead to a more "efficacious" and stable administrative regime,⁶³ and would avoid the pitfalls of aggrandizement.⁶⁴

What can be gleaned from the language and history of the Appointments Clause? How does it reflect on the action taken by President Clinton?

First, Congress alone has the authority to provide for the appointment of inferior officers.⁶⁵ The Assistant Attorney General for Civil Rights is such an inferior officer. Congress required that the civil rights post be filled by and with the advice and consent of the Senate.⁶⁶

Second, Congress can vest in the President or other department head the power to appoint such inferior officers.⁶⁷ Congress created an exception to the advice and consent requirement for certain Executive agents, including the Assistant Attorney General for Civil Rights, which allows the President to fill a vacancy in the post for 120-days with the head of another department whose appointment is vested in the President by and with the advice and consent of Congress.⁶⁸ Congress has provided for no other method of filling the civil rights post.

It follows therefrom that, if the President appoints one to a post without constitutional or statutory authority, it violates not only the language of the Constitution, but the Framers' clear intent to have separation of powers between the Executive and Congress that stifles the accumulation of political power in one branch.⁶⁹ President Clinton's appointment of Mr. Lee as "Acting" Attorney General for Civil Rights violated both, for he lacked the constitutional or statutory authority for his action and usurped the Senate's constitutionally granted power by bypassing the approval process dictated by the advice and consent clause.⁷⁰ As a result, the President has violated the underlying principle of the Constitution – separation of powers.

61. *Id.*

62. *Id.*

63. THE FEDERALIST NO. 76, *supra* note 50, at 457.

64. See Cooper, *supra* note 56 at 362-63.

65. See U.S. CONST. art. II, § 2, cl. 2.

66. See 28 U.S.C. § 506 (1994).

67. See U.S. CONST. art. II, § 2, cl. 2.

68. See 5 U.S.C. §§ 3347-48 (1994).

69. See discussion *infra* at part II.

70. See generally, THE FEDERALIST NOS. 66, 76, 77 (Alexander Hamilton). See discussion *infra* at 117-121.

IV. The Separation of Powers Doctrine and its Application to the "Acting" Appointment of Bill Lann Lee

A. The Doctrine

1. *The Federalist* Perspective

The Founders' perspective provides insight into the jurisprudence of separation of powers.⁷¹ James Madison is responsible for guiding our inquiry into the Framers' conception of separation of powers underlying the Constitution.⁷² Madison began by clarifying what is meant by the maxim "separation of powers": it does not mean "that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other."⁷³ He decried a clear split between the powers of one department and that of another, because such an approach would actually undermine the power of each branch to control aggrandizement by the others.⁷⁴ Madison argued that "unless these departments be so far connected and blended [so] as to give each a constitutional control over the others," the separation of powers required for an effective and just government "can never in practice be duly maintained."⁷⁵

The Framers fought for a government founded on "free principles,"⁷⁶ but also one that devolved powers to each branch. Such powers of the government would in general be "so divided and balanced among several bodies . . . that *no one could transcend their legal limits without being effectually checked and restrained by the others.*"⁷⁷ What appears to emerge from the words of Madison is not a strict separation of powers, but what has become commonly known and revered as a system of checks and balances.⁷⁸ Thus, because the Framers believed a facial split would fail,⁷⁹ the "mutual relations" of the branches – their interior structure – must keep each other in "their proper places."⁸⁰

The only way to secure the three branches from the steady concentration of power by one branch is to give each branch the constitu-

71. See Cooper, *supra* note 56, at 367.

72. See generally THE FEDERALIST NOS. 47-51 (James Madison).

73. THE FEDERALIST No. 47, at 302 (James Madison) (Clinton Rossiter ed., 1961) Madison believed that Montesquieu's conception of Separation of Powers was only that when the "whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted." *Id.* at 302-03.

74. See THE FEDERALIST No. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

75. *Id.*

76. *Id.* at 311. (emphasis added).

77. *Id.* (emphasis added).

78. See Cooper, *supra* note 56, at 364.

79. THE FEDERALIST No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961).

80. *Id.*

tional means and motives to resist such aggrandizement by the others.⁸¹ The defense, however, must be "commensurate to the danger of attack."⁸² For example, the veto power possessed by the Executive⁸³ and the advice and consent power bestowed upon the Senate⁸⁴ are explicit defenses in the Constitution.⁸⁵ However, Madison noted that in a republican form of government, the defenses can never be equal because the legislature "necessarily predominates."⁸⁶ Thus, though the Executive has the veto power, it can be overridden by a two-thirds vote of both houses.⁸⁷

The paradigm created by the Framers of checks and balances is evident in the language and function of the Appointments Clause, discussed above.⁸⁸ The President is vested with the authority to nominate, but must appoint "by and with the advice and consent of the Senate," unless Congress provides otherwise for inferior officers.⁸⁹ But the Senate cannot appoint its own preference; rather, the person appointed will be of the President's preference, even if not the first in degree.⁹⁰ In essence, the Appointments Clause is the epitome of the checks and balances approach to separation of powers envisioned by the Framers.

The Framers' exposition on the principles of separation of powers "does little to inform decisions concerning where certain powers should rest, the degree of separateness desired, or the protections necessary to ensure the maintenance of separate departments."⁹¹ Nor did the Framers leave us with any dominant guiding theoretical paradigm for solving separation of powers problems,⁹² because the checks and balances approach was strictly one of compromise.⁹³ What it does do, however, is provide "insights to guide separation of powers jurisprudence."⁹⁴

81. See *id.* at 321-22.

82. *Id.* at 322.

83. See U.S. CONST. art. I, § 7, cl. 2.

84. See U.S. CONST. art. II, § 2, cl. 2.

85. Cf. Cooper, *supra* note 56, at 364-65.

86. THE FEDERALIST NO. 51, *supra* note 79, at 322.

87. See U.S. CONST. art. I, § 7, cl. 2.

88. See discussion *infra* Part III.

89. U.S. CONST. art. II, § 2, cl. 2.

90. See THE FEDERALIST NO. 76, *supra* note 50, at 457.

91. Cooper, *supra* note 56, at 366.

92. See *id.*

93. See *id.* at 364.

94. *Id.* at 367.

2. *The Modern Judicial Approach to Separation of Powers Issues as Exposed in Youngstown Sheet and Tube, Co.*⁹⁵

The Court in *Youngstown Sheet & Tube Co.* considered whether President Truman's order to seize the nation's steel mills in light of an impending strike by the union was a violation of the separation of powers.⁹⁶ The Court's separation of powers jurisprudence essentially arose from Justice Black's opinion, which gave rise to the formalist approach,⁹⁷ and Justice Jackson's concurrence that gave rise to the functionalist analysis.⁹⁸

Justice Black's analysis began with the proposition that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."⁹⁹ There was no statutory authority on which the President could rely.¹⁰⁰ In fact, Congress had explicitly considered giving the President such power when considering the Taft-Hartly Act, but refused to do so.¹⁰¹ Thus, Black's analysis turned to whether the President had constitutional authority to issue the order.¹⁰²

The Constitution clearly did not give the President express authority for his action.¹⁰³ The President, however, argued that his au-

95. This Note, and this section in particular, is not intended as a critique of the Separation of Powers doctrine developed by the Supreme Court over the years. There are many scholarly articles and books on this subject, which are well beyond the scope of this note. See, e.g., Paul R. Verkuil, *Separation of Powers, The Rule of Law and The Idea of Independence*, 30 Wm. & Mary L. Rev. 301 (1989); Alan B. Morrison, *A Non-Power Look at Separation of Powers*, 79 Geo. L. J. 281 (1990). Rather, it describes the basic doctrines of formalism and functionalism revealed in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In the following section, the traditional test will be applied to the facts before us, in order to determine whether the appointment of Bill Lann Lee violated the separation of powers doctrine. This Note does not delve through the history of Separation of Powers jurisprudence for two reasons. First, the scope of this Note is only to apply the basic doctrines now used by the Court, whether formalism or functionalism, and to argue simply that the Lee appointment is a clear violation of Separation of Powers. Second, there are no Separation of Powers cases on point. The case law has not been developed in the area of appointments and its relation to Separation of Powers. Rather, the Court has focused on the removal power of the President. See, e.g., *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Myers v. United States*, 272 U.S. 52 (1926). But these cases help little in analyzing the appointment side of the equation because they deal with an area not expressly covered by the language and history of the Constitution like the Appointments Clause in article II, § 2.

96. 343 U.S. at 582.

97. See *id.*

98. See *id.* at 634.

99. *Id.* at 585.

100. See *id.*

101. See Labor Management Relations Act, 1947, 61 Stat. 136, 152-56, 29 U.S.C. §§ 141, 171-180 (1994); see also *Youngstown Sheet & Tube Co.*, 343 U.S. at 586.

102. See *Youngstown Sheet & Tube Co.*, 343 U.S. at 587-89.

103. See *id.* at 587.

thority for the seizure could be implied from the aggregate of his power.¹⁰⁴ The President relied on the following language: "The executive Power shall be vested in a President . . .; that 'he shall take Care that the Laws be faithfully executed'; and that he 'shall be Commander in Chief of the Army and Navy of the United States.'"¹⁰⁵

First, Justice Black rejected the "Commander in Chief" argument on grounds that even in that capacity the President could not take possession of private property in an effort to counter domestic labor disputes.¹⁰⁶ Justice Black perceived that responsibility to be for the "Nation's [Congress,] not for its military authorities."¹⁰⁷ Second, he rejected the "executive power" argument, because "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws . . . and the [veto]."¹⁰⁸ In conclusion, Justice Black argued that the lawmaking authority, and the ability to set policy for dealing with domestic labor disputes, resides solely in the Congress.¹⁰⁹ The President can only faithfully execute the laws created by Congress.¹¹⁰ For the President to impinge on Congress' domain was a violation of separation of powers.

It has been argued that Black's formalistic approach is centered on Montesquieu's warning about the accumulation of power in a single branch.¹¹¹ Therefore, the formalist doctrine requires that the text of the Constitution be interpreted "strictly and literally to keep each branch of government from disturbing the constitutionally granted powers of the others."¹¹² The Constitution's text "helps resolve separation of powers issues touching upon powers expressly enumerated, or expressly prohibited, therein."¹¹³ Thus, under the formalist approach, where the Constitution's language is clear, all that is required of the Court is to strictly interpret the language and apply it to the facts before it. The same is true when Congress has spoken on the issue.

Justice Jackson's concurrence rejects Black's inflexible approach in favor of a balancing approach.¹¹⁴ Under Jackson's balancing ap-

104. *See id.*

105. *Id.*

106. *See id.*

107. *Id.*

108. *Id.*

109. *See id.* at 588.

110. *See id.*

111. *See id.* *See Yoder, supra* note 10, at 177.

112. *Id.*

113. Cooper, *supra* note 56, at 367.

114. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952).

proach, if the action does not disturb the "core function" of another branch, it does not violate separation of powers.¹¹⁵ Jackson believed governing under the Constitution could not be conformed to strict judicial interpretations of power and isolated clauses in the Constitution because the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity."¹¹⁶ Therefore, power in the separate branches will fluctuate.¹¹⁷

In order to accommodate these realities, Justice Jackson developed a three tier analysis for examining separation of powers problems.¹¹⁸ The first tier indicates that "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."¹¹⁹ Jackson recognized that President Truman's order did not fall within this tier, because Congress had expressly rejected such power.¹²⁰

The second tier of Jackson's analysis says that "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."¹²¹ Jackson argues that this tier does not apply either, because "Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure."¹²²

The third tier says that "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."¹²³ In the third tier of analysis, President Truman's seizure order resided.¹²⁴ According to Jackson, "[c]ourts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject."¹²⁵

Jackson first rejected the "executive Power" argument. He argued that the Framers most certainly looked to the great powers possessed by King George III, and surely did not mean to emulate those

115. See Cooper, *supra* note 63, at 368.

116. *Youngstown Sheet & Tube Co.*, 343 U.S. at 635.

117. See *id.*

118. See *id.* at 635-38.

119. *Id.* at 635.

120. See *id.* at 638.

121. *Id.* at 637.

122. *Id.* at 639.

123. *Id.* at 637.

124. See *id.* at 640.

125. *Id.* at 637-38.

in the President of the United States.¹²⁶ He believed the grant of "executive power" was rather a "generic" grant, probably having more to do with ministerial necessity than anything else.¹²⁷

Jackson next rejected the "Commander in Chief" argument. He believed that the President's deployment of troops to Korea was not in itself enough to give rise to the domestic authority to seize and possess the steel mills.¹²⁸ In other words, the President could not invest in himself the war powers entrusted to Congress.¹²⁹ The Constitution gives "'Congress the power to 'raise and support Armies' and 'to provide and maintain a Navy.'"¹³⁰ According to Jackson, this includes the power to see that steel mills supply steel.¹³¹

Finally, Justice Jackson rejected the language "'he shall take Care that the Laws be faithfully executed.'"¹³² Jackson weighed these words against those of the Fifth Amendment due process clause and concluded that "ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules."¹³³

Justice Jackson was not concerned that the single seizure would "plunge us straightway into dictatorship," but that it was "at least a step in that wrong direction."¹³⁴ Congress must remain, in his view, able to check the President in a system of check and balances.¹³⁵ Congress had spoken on the matter, and thus the Court had to affirm its ability to check the President, so long as the President did not possess independent constitutional authority for his action.

The two approaches just described have dominated separation of powers jurisprudence since 1952. That has not changed even today. Accordingly, the appointment of Bill Lann Lee will be reviewed subject to the principles set forth in Justice Black and Justice Jackson's opinions in *Youngstown Sheet and Tube, Co. v. Sawyer*.¹³⁶

B. The President's Appointment of Mr. Lee as "Acting" Assistant Attorney General for Civil Rights Violated the Doctrine of Separation of Powers

Beginning with the formalist approach to separation of powers, it must first be asked whether there is a specific grant of power in the

126. See *id.* at 641.

127. See *id.*

128. See *id.* at 642.

129. *Id.*

130. *Id.* at 643.

131. See *id.*

132. *Id.* at 646.

133. *Id.*

134. *Id.* at 653.

135. See *id.* 653-54.

136. 343 U.S. 579 (1952).

Constitution concerning the question at hand – the appointment of Bill Lann Lee. The obvious answer is yes. Article II of the Constitution clearly provides for the appointment of inferior officers such as the Assistant Attorney General for Civil Rights:

[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone . . .¹³⁷

Congress did create such inferior officers, including the Assistant Attorney General for Civil Rights.¹³⁸ Congress provided, however, that the civil rights post was an office requiring the advice and consent of the Senate.¹³⁹ Here, Bill Lann Lee was nominated for that post and the Senate Republicans rebuked him, forcing Senate Democrats to block the final vote of the Senate Judiciary Committee.¹⁴⁰ Rather than accept the Senate's constitutional authority to refuse to confirm the nomination, President Clinton then appointed Lee on an acting basis.¹⁴¹

Congress' advise and consent is required for the appointment of acting Assistant Attorney General.¹⁴² This was mandated by the Vacancies Act.¹⁴³ However, as discussed above, the President ignored the requirements of the Vacancies Act in appointing Lee.¹⁴⁴ Such blatant disregard for authority expressly delegated to Congress by the Constitution is a clear violation of separation of powers.¹⁴⁵ Likewise, any circuitous attempt by the Attorney General to appoint Lee or assign him the duties of the civil rights post, without requiring either advice and consent or meeting the requirements of the Vacancies Act, is a violation of separation of powers. Congress has explicitly provided the two ways in which the civil rights post could be filled according to its powers under Article II, clause 2: (1) advice and consent, or (2) compliance with the Vacancies Act.¹⁴⁶ Congress authorized no other route by which the President or the Attorney General could fill the position of assistant Attorney General for Civil Rights. Thus, as in *Youngstown Sheet & Tube, Co.*, the President has no constitutional or

137. U.S. CONST. art II, § 2, cl. 2.

138. See 28 U.S.C. § 506.

139. See *id.*

140. See discussion *infra*, Part II-A.

141. See *id.*

142. See discussion *infra*, Part II-B.

143. 28 U.S.C. §§ 3345-49.

144. See discussion *infra*, Part II-B.

145. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-88 (1952).

146. See U.S. CONST. art. II, § 2, cl. 2.

statutory authority on which to rely,¹⁴⁷ exposing the appointment as a violation of the separation of powers.

Justice Jackson's three tier approach would lead to the same conclusion. Again, as in *Youngstown Sheet & Tube, Co.*, the actions here would fall under the third tier. The President would have to show that Congress would be prohibited from acting in the area and that he, as the Executive, possessed independent constitutional powers to take the action he did.¹⁴⁸ However, the President cannot make such a showing, because the language of the Constitution in Article II is clear: Congress may provide for the appointment of inferior officers in the manner it sees fit.¹⁴⁹ The power to set the policy for appointing officers of the United States rests solely in the Congress and nowhere else.

As Justice Jackson so eloquently noted, "ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules."¹⁵⁰ Moreover, he noted that he was not concerned that the single seizure of another branch's power would "plunge us straightway into dictatorship," but that it was simply a step in the wrong direction.¹⁵¹ Such a facial attack on Congress' power under the Constitution to establish the rule for appointing inferior officers, such as Lee, is a step in the wrong direction. Thus, even under the functionalist approach of Justice Jackson, the President's actions must be struck down as violation of the doctrine of separation of powers. This result is in accord with the Framers' intent to establish a government based theoretically on a notion of checks and balances between the three branches of the federal government.

Conclusion

President Clinton's appointment of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights was a clear violation of the doctrine of separation of powers. The President's "Acting" appointment was contrary to the Vacancies Act, which Congress passed under its Article II, section 2, appointments power. Congress alone was vested with the power to determine the manner of appointments for inferior officers, such as of the civil rights post, and the President's only duty was to comply. The President did not comply with the explicit constitutional grant of authority and, therefore, violated the doctrine separation of powers in appointing Lee on an "Acting" basis.

147. See *id.*

148. See discussion *infra*, Part IV-B.

149. See U.S. CONST. art. II, § 2, cl. 2.

150. *Youngstown Sheet & Tube, Co.*, 343 U.S. at 646.

151. *Id.* at 653.